90-926

No.____

In The
Supreme Court of the United States
October Term, 1990

STATE OF MICHIGAN; and
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners-Appellants,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents-Appellees,

and

HOVER TRUCKING COMPANY OF MICHIGAN,
Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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QUESTION PRESENTED

I

Whether the Interstate Commerce Commission and the Sixth Circuit's misapplication of this Court's explicit subterfuge analysis for second state routings of intrastate freight constitutes *de-facto preemption* severely undermining Michigan's congressionally preserved right to regulate intrastate transportation by motor carriers.

LIST OF PARTIES

The parties before the United States Court of Appeals for the Sixth Circuit were:

Petitioners/Appellants
State of Michigan and Michigan Public Service Commission (Sixth Circuit No. 89-3414),
Allied Delivery System, Inc. (Sixth Circuit No. 89-3383),
and
Alvan Motor Freight, Inc.; TNT Holland Motor Express, Inc.; and Parker Motor Freight, Inc. (Sixth Circuit No. 89-3401),

Respondents/Appellees
Interstate Commerce Commission and United States of America,

Respondent/Intervenor
Hover Trucking Company of Michigan

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The State of Michigan ("Michigan") and the Michigan Public Service Commission ("MPSC") petition that a writ of *certiorari* issue to review the July 26, 1990 order and September 10, 1990 order denying rehearing of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The July 26, 1990 unreported Sixth Circuit Court decision is in *Allied Delivery System, Inc., et al v. Interstate Commerce Commission, et al.*, Case Nos. 89-3383/3401/3414 reproduced in the Appendix at pp. 1a-16a. The Sixth Circuit subsequently denied the Joint Petition for Rehearing and Suggestion for Re-

hearing En Banc in an unreported order dated September 10, 1990, reproduced in the Appendix at pp. 17a-18a.

The March 3, 1989 unreported Interstate Commerce Commission ("ICC") Order is in *Michigan Public Service Commission v. Hover Trucking Company of Michigan*, Docket No. MC-C-30092 (decision served March 13, 1989), reproduced in the Appendix at pp. 18a-31a.

JURISDICTION

Jurisdiction in this court exists by *Certiorari* pursuant to 28 U.S.C. 1254(1). Jurisdiction in the Sixth Circuit existed pursuant to 28 U.S.C. 2342(5), 2343, and 2344.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Interstate Commerce Act, 49 U.S.C. § 10101 et seq. ("ICA"), the Administrative Procedures Act, 5 U.S.C. § 706(2) ("APA"), and the Michigan Motor Carrier Act, 1933 P.A. 254, M.C.L. 475.1 et seq. ("MMCA"), relevant portions of which are reproduced in the Appendix at pp. 33a-40a.

STATEMENT OF THE CASE

A. Statutory Background

Federal statutes grant the ICC authority to regulate the legitimate transportation by motor carriers of traffic with a single state origin and destination when routed through a second state [49 U.S.C. § 10521(a)(1)(B)]. Other relevant federal statutes, however, [49 U.S.C. § 10521(b)] expressly preserves for the states regulation of intrastate transportation and prohibit fed-

eral regulations from "affecting" the ability of states to regulate intrastate transportation.

B. Proceedings Below

On March 21, 1988, the MPSC filed a complaint in the ICC against Hover Trucking Company of Michigan ("Hover") seeking a declaration that Hover's second state routing of its Michigan to Michigan freight was a subterfuge to evade Michigan regulation and in violation of § 10521(b) of the ICA.

On March 13, 1989, the ICC, based solely upon written pleadings and without benefit of oral hearings, decided that Hover's operation constituted legitimate interstate commerce and was not a subterfuge. The ICC dismissed the MPSC's complaint.

On July 26, 1990, the Sixth Circuit Court, with a partial dissent, affirmed the ICC, holding that there was no abuse of discretion by the ICC or want of substantial evidence to support the ICC's decision. On September 10, 1990, the Court denied the Petitioner's Joint Petition for Rehearing.

C. Facts Concerning Hover's Operation

Hover was established in 1958 and, for 25 years, maintained its terminal headquarters in Niles, Michigan (located in southwest Michigan along the Michigan/Indiana border). After Congress passed the Motor Carrier Act in 1980, which eased entry obstacles, Hover obtained, from the ICC, a common carrier certificate authorizing transportation of general commodities between all points in the lower 48 states.

Simultaneously with acquiring its 48-state ICC authority, in June of 1983, Hover moved its terminal headquarters from Niles, Michigan, to a facility just across the state line in South

Bend, Indiana. Immediately thereafter, in 1983 and 1984, Hover began establishing additional terminals in Michigan and today operates terminals at Jackson, Detroit, Saginaw, Pontiac, Manton, and Standish, Michigan.

After its move to South Bend, Hover radically altered its Michigan service and began actively soliciting Michigan intrastate traffic for which it possessed no MPSC authority. In soliciting this freight regardless of its origin and destination, Hover claimed that by moving it across the state line for consolidation at South Bend, the intrastate freight was "transformed" into interstate traffic, which could be handled pursuant to its ICC certificate.

The Michigan to Michigan freight handled by Hover, which is allegedly routed through South Bend, covers the entire lower peninsula of Michigan. When Hover's Michigan traffic is routed through South Bend, it is forced to circuitously travel double the number of miles (or more) on each of its shipments from the respective Michigan origin terminal to South Bend, and then back to the respective Michigan destination terminal which adds anywhere from 224-468 additional wasteful miles to each shipment.

Although Hover's "subterfuge" and corresponding evasion of state regulatory authority were the gravamen of the ICC complaint below, there is an overriding and vastly more important issue at stake here that is of *constitutional* dimension: Whether the ICC exceeded the authority that Congress, pursuant to Article I, Section 8 of the Constitution, delegated to it in the ICC's jurisdictional statute, 49 U.S.C. § 10521, to regulate interstate transportation. Further, whether the ICC ignored the policy of cooperation with state transportation administrators that Congress explicitly adopted in 49 U.S.C. § 10101(a)(5). And, finally, whether the ICC's decision directly conflicts with prior relevant precedent of this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW DIRECTLY CONFLICT WITH CONTROLLING PRECEDENT OF THIS COURT THEREBY UNDERMINING THE CONGRESSIONALLY PRESERVED RIGHT OF STATES TO REGULATE INTRASTATE COMMERCE.

The thrust of the complaint filed with the ICC below is that a motor carrier may not use its interstate operating authority to evade legitimate state regulation of intrastate transportation. This underlying principle is derived from this Court's holding in *Eichholz v. Public Service Comm. of Missouri*, 306 U.S. 268 (1939), in which the Court confronted a situation wherein a motor carrier was shipping freight between two points in Missouri via a terminal in another state.[1] The Missouri Commission contended that such shipments constituted intrastate commerce. In its review, this Court held:

> "If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the state's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint." 306 US 268, 274.

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[1] The motor carrier operator, Mr. Frank Eichholz, operated in Missouri, Kansas and Iowa, maintaining terminals in St. Louis, Missouri, Kansas City, Kansas and other terminals in Kansas and Iowa. 306 U.S. 268, 270. The shipments protested by the Missouri Commission involved shipments between St. Louis and Kansas City, Missouri via Kansas City, Kansas.

Under the facts in *Eichholz*, this Court concluded that such shipments were not made in good faith but were really a subterfuge to evade Missouri jurisdiction.

The basic principle of *Eichholz* was reaffirmed by this Court in *Service Storage & Transfer v. Virginia*, 359 U.S. 171 (1959). *Service Storage* involved a trucking company, who pursuant to an interstate certificate, transported freight between various points in Virginia by routing the freight through a West Virgina terminal prior to delivery. The Virginia Commission found the routes employed by Service Storage through West Virginia were a subterfuge to evade state law. On review, this Court reversed and held as follows at 359 U.S. at 175:

> "The Commonwealth's criminal case is bottomed on shipments, the origin and final destination of which are in Virginia. While it stipulated that all of the shipments were routed through Bluefield, West Virginia, and were, therefore, on their face interstate shipments.[3] Virginia takes the position that they were clearly intrastate in character because had they been moved over direct routes none would ever have left the Commonwealth. It contends that petitioners' circuitous and unnecessarily long routes were a mere subterfuge to escape intrastate regulation and evade its jurisdiction. . . . However, it [Virginia] offered no direct evidence of bad faith on the part of petitioner in moving its traffic through Bluefield, West Virginia.

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[3]

49 U.S.C. § 303(a)(10) defines 'interstate commerece as including commerce . . . between places in the same state through another state, . . .' 544."

Service Storage also removed the right of Petitioners to initiate state actions against carriers, challenging second state routings of intrastate freight and instead required all future challenges to be filed exclusively in the ICC, 359 U.S. at 177-179.

The Court in *Service Storage* also held that "direct evidence of bad faith,"[2] on the part of a carrier in moving its intrastate traffic through a second state, would establish that the routing was "a mere subterfuge to escape intrastate regulation and evade its jurisdiction," 359 U.S. at 175. In *Service Storage*, however, this Court found no direct evidence of bad faith, in lieu of which they determined the ICC must analyze factors such as circuity, operational efficiency, and the relation of the traffic at issue to that of the carrier's overall operation, in deciding such cases.

Subsequently, the ICC, in numerous decisions, and without exception, followed *Service Storage* and in its 1971 decision in *Pennsylvania Public Utility Commission v. Arrow Carrier Corp*, 113 M.C.C. 213 (1971), *aff'd sub nom Pennsylvania Public Utility Comm v. United States*, 1973 Fed Carr Cas (CCH) 56,206 (M.D. Pa 1973) *aff'd per curiam*, 415 U.S. 902 (1974), actually incorporated these factors into a test providing that where there was no direct evidence of bad faith, the ICC would conduct a three-part "bad faith" proxy analysis of the circuity, operational efficiency and dominance of the traffic involved in a challenged routing.

In the instant case, however, the ICC was confronted with overwhelming "direct evidence of bad faith"[3] that should have left it no choice, when properly applying *Service Storage*, but to find Hover's operation to be a subterfuge. Instead, the ICC issued a decision in direct conflict with *Service Storage*, holding

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[2]

Examples of the factors enunciated by the Court in establishing direct evidence of bad faith are the length of time the out-of-state terminal existed in the carrier's operation; and the length of time the carrier has held authority from the ICC authorizing its operations. 359 U.S. at 177.

[3]

In the proceedings below, Petitioners set forth no less that 17 separate factors which established overwhelming "direct evidence of bad faith", including those types of "bad faith" factors described in *Service Storage*.

that despite the overwhelming evidence of bad faith, "motivation is not relevant." ICC decision page 7. (Appendix p. 2a).

This conclusion by the ICC was arbitrary, an abuse of discretion, in excess of statutory jurisdiction, and unsupported by substantial evidence thus clearly warranting reversal by the Court below.[4] Incredibly, however, the majority was merely "given pause"[5] by this ICC finding, but did not find it to be reversible error.[6]

The decisions below are equally deficient on the circuity question. It is undisputed that in discussing circuity, this Court in *Service Storage*, just as in *Eichholz*, addressed only that intrastate traffic which Service Storage routed through the second state. It did *not* take into consideration other traffic origined from or destined to points outside of the single state because it recognized the only way to properly determine circuity was to

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[4]

The litany of bad faith factors present in this case are "dispositive" with regard to Hover's subterfuge operation. For the Court below to affirm the ICC was in clear violation of the review standard set forth in the Administrative Procedures Act, 5 U.S.C. § 706(2) (Appendix p. 38a), requiring the Court to set aside the ICC's decision, or at the very least, remand the case to the ICC for a proper analysis of Hover's "bad faith."

[5]

At pages 4-5 of its decision below (Appendix pp. 8a-9a), the Court stated: *"We are given pause by the ICC's assertion in this Court that 'motivation is not relevant* here because the criteria set forth in *Arrow, supra*, have been met.' *. . . Discussion of the 'direct evidence' that was offered to show subterfuge or bad faith probably leaves something to be desired*, but it was within the Commission's province to find, as it did, that the fact that Hover had admittedly engaged in illegalities was not dispositive." (Emphasis supplied).

[6]

Circuit Judge Wellford on the other hand, in the dissenting portion of his opinion, did in fact properly find considerable error by the ICC in reaching this decision and thus would have recommended remand on this all-important question of "direct evidence of bad faith." (Appendix pp. 15a-16a).

calculate the difference between the direct movement and the movement via the second state.

Subsequently, the ICC, without exception, properly applied the circuity analysis in the manner devised in *Eichholz* and *Service Storage*, until its decision below. In the instant case, the ICC created a wholly new circuity test whereby, rather than compare the direct route of the intrastate traffic versus the out-of-state route, it would consider any other traffic that continued to move beyond the second state terminal thus artificially diluting the circuity factor.[7]

The ICC's new circuity factor analysis, as affirmed by the Court below, is non-sensical and yields inconsistent and inequitable results. The new, broader circuity factor analysis considers *all* the traffic mileage involving freight moving in and out of Hover's Michigan terminals to or from *all* points on Hover's system. This new approach reduces the circuity analysis to a meaningless test, resulting in disparity, and the undermining of state regulatory authority over intrastate motor carrier transportation.[8] Clearly such an analysis automatically favors larger

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[7]

The degree of circuity involved in Hover's Michigan to Michigan operations pursuant to methodology established in *Service Storage* was 92%. However, the ICC and the Court below found the appropriate circuity factor to be 24.2%. The rationale for the ICC's finding of the 24.2% circuity factor was confined to a single footnote which said: "This figure takes into account all traffic moving to and from defendant's Michigan terminals (including traffic with origins or destinations outside Michigan)." [ICC decision p. 6 (Appendix p. 27a)].

[8]

This new circuity factor analysis will greatly facilitate the dismantling of state regulation over intrastate motor carrier transportation. Every Michigan motor carrier, regardless of its geographic location, will be entitled to evade MPSC regulation by merely crossing the state line with its Michigan to Michigan shipments, regardless of the thousands of additional miles incurred. From a public policy standpoint such a result is hardly desirable since no amount of "competition" seems worth the excessive use of fuel and unnecessary use of the highways, especially in the midst of revived fuel supply, and price concerns.

motor carriers especially those having terminals in far away destinations. A few trips across the country would considerably soften any excess mileage incurred in shipping between two Michigan destinations via a terminal just across the Michigan state line. Therefore, the ICC's new analysis is nothing more than a sliding standard, altogether dependent on how extensive a motor carrier's operation is. Thus, on its face, the new circuity analysis is unreasonable. Moreover, the new circuity analysis compounds the injury to the MPSC since it improperly shifts the focus from, and virtually ignores, the very gravamen of Michigan's ICC complaint (i.e. Hover's Michigan to Michigan shipments via South Bend terminals are undertaken as a means to evade Michigan jurisdiction).

The ICC failed to provide a reasoned explanation for its departure from the long-standing precedent established for determining circuity, as required by this Court in *Atchison, Topeka and Santa Fe RR Co. v. Witchita Board of Trade*, 412 U.S. 800 (1973). The Court below also erred by failing to address the circuity question independently or the ICC's misapplication of the circuity test established in *Eichholz* and *Service Storage*.

In *Service Storage*, this Court determined the "clear meaning" of the statutory provision classifying second state routings of single state freight. As such, the ICC and the Court below were precluded from reinterpreting that provision in a contrary manner. As this Court has recently held in *Maislin Industries U.S., Inc., v. Primary Steel, Inc.*, ____ U.S. ____; 110 S. Ct. 2759; 111 L.Ed. 2d 94, 111 (1990):

> "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."

Because this Court has restricted petitioners to presenting these types of challenges exclusively in the ICC, the ICC must be bound by this Court's landmark precedent on this issue. The ICC cannot be allowed to ignore this Court's mandates, at the expense of the congressionally preserved right of states to regulate legitimate intrastate commerce. Thus, the decisions below must be reversed.[9]

II. THE DECISIONS BELOW IGNORE THE MANDATE OF CONGRESS WHICH HAS PRESERVED STATE JURISDICTION OVER INTRASTATE MOTOR CARRIER TRANSPORTATION AND RESULTS IN DE-FACTO PREEMPTION OF MICHIGAN'S INTRASTATE MOTOR CARRIER REGULATION

Congress, in the 1935 Motor Carrier Act and in 1980 amendments thereto, mandated that the State's authority to regulate intrastate motor carrier transportation be preserved. The 1935 Act, P.L. 74-225, as amended in 1980, 49 U.S.C. § 10521(a)(1)(B), 1980 P.L. 96-296, (Appendix p. 34a), confers upon the ICC the statutory authority to regulate the transportation of property between "a state and another place in the same state through another state." However, while § 10521(a)(1)(B) may confer ICC jurisdiction over Michigan to Michigan transportation of property conducted by Hover via its South Bend facility, § 10521(b) (Appendix p. 35a) restricts the ICC's authority by providing that "this subtitle does not" . . . *"affect the power of a state to regulate intrastate transportation provided by a motor carrier"* (emphasis supplied).

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[9]

See *California v. FERC*, 495 U.S. ____; ____, 109 L. Ed. 2d 474, 110 S. Ct. ____ (1990), recognizing the respect "this Court must accord to long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes".

In enacting § 10521(b), Congress specifically sought to avoid state/federal conflicts concerning the regulation of motor carriers, and to prevent federal infringement or usurpation of state motor carrier regulation. Also, while the 1980 amendments to the Act largely deregulated interstate motor carrier transportation, the amendments did not change Congress' original mandate to preserve state regulation. Indeed it specifically withheld from the ICC any power to deregulate intrastate transportation, or to otherwise interfere with such state regulation. This conclusion is underscored by Congress' policy objectives in the 1980 Act, stated in 49 U.S.C. § 10101(a)(5) (Appendix p. 33a): "It is the policy of the United States Government . . . to cooperate with each State and the officials of each State on transportation matters."

Petitioners submit that the ICC and the Court below mistakenly assume that because interstate operations were largely deregulated in 1980, prior relevant statutory provisions and judicial precedents are no longer viable. Recently, however, this Court addressed that very question in *Maislin (supra)*, and held to the contrary stating:

> "The ICC maintains, however, that the passage of the Motor Carrier Act of 1980 (MCA) . . . justifies its Negotiated Rates policy. The MCA substantially deregulated the motor carrier industry in many ways in an effort to 'promote competitive and efficient transportation services.' . . . *We reject this argument. Although the Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, . . . it does not have the power to adopt a policy that directly conflicts with its governing statute. . . . Generalized congressional exhortations to "increase competition" cannot provide the ICC authority to alter the well-established statutory . . . requirements.*" (Emphasis supplied). (111 L.Ed. 2d at 112-113).

Because the ICC's findings and the Sixth Circuit's affirmance thereof constitute decisions which, in principle, directly conflict with the ICC's governing statute [10521(b)], a reversal is equally compelling here.

This Court has, on numerous occasions, preserved state jurisdiction from efforts to preempt state authority in analogous situations where Congress provided for dual state/federal regulatory jurisdiction. For example, in *Louisiana Pub. Service Comm. v. FCC*, 476 U.S. 355, (1986), this Court struck down a decision of the Federal Communications Commission ("FCC") which sought to require State regulatory commissions to use the FCC-established depreciation schedules applicable to interstate telephone equipment and service to determine depreciation for intrastate equipment and service. The FCC had determined that its new depreciation schedules were necessary to support its policy goals of promoting competition in the industry, and that such FCC-mandated schedules were to be applied at both Federal and State levels to ensure against State actions which would "frustrate the accomplishment of that policy." 476 U.S. at 364.

Noting Congressional intent to preserve state regulatory jurisdiction over intrastate telecommunications [as stated in Section 1(b) of the Federal Communication Act of 1934, 47 U.S.C. § 152(b)], this Court rejected the FCC's argument that the agency could preempt State regulation to "effectuate a federal policy," particularly in the absence of specific Congressional authority to take preemptive action. *Id.* at 385. In so holding, the Court extensively reviewed the preemption tests, holding that "The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law," *Louisiana*, 476 U.S. at 368, and that "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority." Furthermore, "an agency literally has no power to act, let alone pre-empt . . . unless and until Congress confers power upon it,"

and it "may not confer upon itself power" or "expand its power in the face of a congressional limitation on its jurisdiction." 476 U.S. at 374. Similarly, this Court has repeatedly rejected claims in other cases that certain aspects of State regulation of utilities and motor carriers were implicitly preempted or otherwise curtailed by various Federal programs.[10]

Louisiana and other cases applies with equal force to the ICC in this case. Just as 47 U.S.C. § 152(b) denied the FCC authority to regulate "intrastate communication service by wire" (476 U.S. at 365-368), 49 U.S.C. § 10521(b) denies the ICC the authority to use the ICA to "affect the power of a State to regulate intrastate transportation provided by a motor carrier." Both Congressional denials are clearly and categorically stated; neither provides any exceptions to permit the voiding or restricting of state law or regulations. Thus, the ICC and the Court below *may not*, consistent with Congressional intent, redefine "interstate" traffic in such a way that State regulation of intrastate traffic becomes an empty and meaningless shell, particularly when that redefinition is contrary to previous ICC as well as judicial precedent.

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[10]

Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48 (1985)v (State decisions to accept collective intrastate motor carrier rate proposals do not violate federal antitrust laws in the absence of Congress' explicit intention to limit State regulation of intrastate commerce); *Arkansas Electric Coop. Corp. v. Arkansas Pub. Service Comm.*, 461 U.S. 375 (1983) (State regulation of rural electric generating and transmission cooperatives not implicitly preempted by Federal loan requirements for REA borrowers); *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Comm.*, 461 U.S. 190 (1983) (State moratorium on new nuclear power plant construction not implicitly preempted by Federal regulation of nuclear plant safety); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987) (State regulation of the acquisition of securities of State-chartered corporations not preempted by Federal securities laws); *Northwest Central Pipeline Corp. v. Kansas*, 489 U.S. 493 (1989) (State regulation of the production and gathering of natural gas not preempted by Federal Natural gas Act, 15 U.S.C. § 717 et seq.). Such cases document the Court's general reluctance to uphold claims voiding state law and regulation where Congress has not explicitly ordained such result.

Despite the exhaustive arguments presented by the Petitioners indicating that § 10521(b) prohibited the ICC from "affecting a state's ability to regulate intrastate transportation" the Court below gave short shrift to these critical arguments.[11] It was error for the Court below, in the face of the express language of § 10521(b), to conclude that Petitioners did not present "statutory support" for the proposition that the ICC cannot interfere with the state's right to regulate intrastate transportation.

Since the ICC's decision below, Michigan carriers are strongly encouraged to set up Hover-type operations, which will result in the wasteful use of Michigan highways and resources and in the increasing diversion of freight from legitimate intrastate carriers. Before long, most large carriers providing Michigan to Michigan service will have no choice but to establish terminals just across the Michigan state line if they are to withstand the predatory pricing tactics of Hover-type carriers. Within a short period of time, Michigan's system of intrastate regulation of motor carriers will be obliterated. Eventually, only the largest interstate carriers will survive and all other small carriers operating in Michigan, and in all other states, will be forced into bankruptcy. Further, even if Hover and the other carriers are *actually* transporting freight via the extremely circuitous routes (which is often not the case because many of these carriers will illegally move freight direct so as to avoid the wasteful expense), the adverse impact and increased traffic on Michigan highways is inconsistent with the purposes of the MMCA.

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[11]

At pages 4-5 of its decision below (Appendix p. 5a), the Court held: "The PSC has presented neither caselaw nor statutory support for the proposition that the statute permits the ICC to regulate the transportation described in § 10521(a)(1)(B) only so long as it does not interfere with a state's regulation of intrastate transportation. The ICC was well within its jurisdiction."

49 U.S.C. § 10521(a)(1)(B)'s classification of second state routings of single state freight as interstate, was intended to cover situations involving little or no circuity whatsoever.[12] Not until Hover, did a carrier devise that such a routing could be employed to cover freight origined to or destined from the *entire* bordering state. Very simply, Hover saw a loophole and took advantage of it. Rather than close the loophole, however, the decisions below condoned Hover's operation, thereby sending the message to the motor carrier industry that intrastate authority was no longer necessary.

The peninsular geography of Michigan, in particular, requires Hover-type carriers to travel several hundred additional circuitous miles when engaging in second state routings of Michigan freight. Hover itself must travel an astounding 224-468 *additional* wasteful miles for each shipment, in evasively moving its Michigan freight between its seven Michigan terminals and its South Bend terminal. Adding to this, the numerous other carriers currently known to be engaging in or setting up Hover-type operations in Michigan, this figure could quickly escalate to millions of circuitous wasteful miles clogging up Michigan's highways and wasting resources.

At the same time, however, many of these carriers may be tempted to not *actually* engage in this grossly wasteful routing. Instead, they may "claim" to be routing freight through a second state, but in fact do not just as Hover admitted doing in this proceeding.[13] Thus carriers may then move the intrastate

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[12] This provision was intended to allow an interstate carrier located in D.C., for example, to also handle freight under its interstate authority that was origined or destined to proximate second state points like Alexandria or Arlington, Virginia.

[13] Hover generated false documents reflecting an Indiana routing of all its Michigan freight much of which, Hover later admitted, *never left Michigan.*

freight direct without having to obtain intrastate authority. While Michigan can try to catch these carriers, it is an extremely complicated and time consuming enforcement task.

The decisions below directly undermine the MPSC's valid regulation of intrastate motor carrier transportation, as mandated by state legislation for important public purposes, including *inter alia*, protecting public safety, conserving the highways, and promoting fair competition. These public purposes promoted by the MMCA are furthered by amendments enacted in 1982 (1982 P.A. 399, M.C.L. 475.1 *et. seq.*), which provide for new, eased entry standards, increased rate flexibility, and other reforms to increase competition in the Michigan motor carrier industry, while retaining some measure of regulatory control over routes, rates, and operations to promote safety, conservation of highways, etc.

Hover-type carriers establish Michigan terminals, serve Michigan shippers, use Michigan highways, and consume Michigan resources, yet merely based on evasive and circuitous routings, the decisions below conclude that Michigan has no jurisdiction whatsoever to regulate or control these pervasive Michigan operations.

Legitimate intrastate carriers must apply for MPSC authority, demonstrate a public need, prove that new service won't endanger the ability of present carriers to operate or conflict with the purposes of the MMCA. Hover and Hover-type carriers, on the other hand, pursuant to the decisions below, can now invade Michigan and conduct unrestricted, discriminatory, predatory operations to the severe detriment of, and in total disregard, for Michigan's carefully crafted system of motor carrier regulation. Michigan must be given the right to regulate and control such extensive intrastate operations if its congressionally preserved right of regulation is to be upheld.

The only way that Michigan can curb the onslaught of Hover-

type operations is for the State to deregulate intrastate motor carrier transportation just as the Congress has done for interstate. However, despite the push for deregulation over the past several years, Michigan has rejected taking that approach since it perceives a failure of deregulation at a federal level.[14]

Accordingly, the ICC should not be allowed to extinguish the State's ability to regulate intrastate commerce which is expressly protected by Congress pursuant to § 10521(b).

III. ALTERNATIVELY, THIS COURT SHOULD REMAND THIS CASE AS SUGGESTED IN THE SEPARATE CONCURRING/DISSENTING OPINION OF JUDGE WELLFORD BELOW WHO PROPERLY DETERMINED THAT THE ICC'S GLARING ERRORS WITH REGARD TO "CIRCUITY" AND "BAD FAITH" WARRANTED A REMAND

The MPSC's arguments for certiorari are consistent with portions of the separate concurring/dissenting opinion below of Judge Wellford.[15] Judge Wellford, unlike the majority of the Court below, saw the clear error in the ICC's reasoning and conclusions. Thus, Petitioners submit that had the majority properly analyzed these issues, it would have arrived at the same result.

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[14]

Since interstate deregulation in 1980, there has been a conglomeration and merger among LTL carriers in order to survive that has resulted in approximately 60 percent of the interstate freight and 90 percent of the revenues being handled by the top 10 carriers; there has also been a deterioration in safety; a high number of business failures; inadequate service; discriminatory pricing; and a deterioration of labor/management relations. Dempsey, Paul S., Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition, 1988, pp 53-56. See also, Transportation Law Journal Vol. XVII No. 1 1988, Dempsey, Paul S., The Empirical Results of Deregulation: A Decade Later, and the Band Played On.

IV. THE DECISION BELOW DOES NOT CONSIDER THE CLEAR ERRORS COMMITTED BY THE ICC, INCLUDING REFUSAL TO GRANT FORMAL EVIDENTIARY HEARINGS IN THIS CASE

The decision below also failed to consider an additional critical argument raised by Michigan and the MPSC in its brief on appeal, namely, that Petitioners were denied due process by

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[15]

As to the circuity issue, at pages 4-5 (Appendix pp. 12a-13a), Judge Wellford indicates:

> "I have concern, however, with respect to the conclusion reached by the ICC that the circuity factor 'does not play a major role' in the evaluation process of whether or not subterfuge is present. . . . It was described as a 'significant' factor in *Pennsylvania PUC v. Arrow Carrier Corporation* (citation omitted). *I agree with this description and would hold that, in a case of this nature, the factor of circuity is substantial and must be given full consideration, together with the other factors herein discussed, in determining the question of bad faith or subterfuge.* I would, then, remand this matter to the ICC for reconsideration of the question of circuity as having a significant role rather than denigrating as 'not a major' one. I would expect also that upon remand ICC would explain its rationale for its new approach in calculating the degree of circuity in order to demonstrate that its methodology on circuity is not arbitrary and capricious but rather, rational." (Emphasis supplied).

As to the "bad faith" issue, at page 8 (Appendix pp. 15a-16a), Judge Wellford indicates:

> "I am at a loss to understand this part of the ICC's conclusions in this controversy. Evidence of bad faith is, indeed, highly relevant to any ultimate determination of subterfuge to circumvent legitimate state regulation. I am aware that in another part of the ICC opinion at issue, the Commission finds that the Van Bokkem statement 'does not form any basis . . . to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation.' Id. Absent the conclusion that 'motivation is not relevant,' perhaps the ICC has chosen a rational explanation for Van Bokkem's admission. *I am persuaded, however, that there should be a remand to the ICC for a clear explanation of its rationale concerning the alleged 'bad faith' actions of Hover which, are the focus of much of Petitioners arguments, recognizing that 'no single factor' is controlling.*" (Emphasis supplied).

the ICC's refusal to formulate an evidentiary record based upon a formal hearing.

When the MPSC originally filed its Complaint against Hover, it requested the ICC to convene a full evidentiary hearing, similar to that previously afforded by the ICC in cases of this type. The ICC denied the request, its sole rationale being that "[I]t is not likely that disposition of the issues in this proceeding will depend upon disputed evidence." (ICC decision dated May 12, 1988, Appendix pp. 31a-32a). But the ICC decison *did, in fact, depend on disputed evidence.*

The Administrative Procedures Act ("APA"), 5 U.S.C. § 554(a)(1) (Appendix pp. 35a-36a), provides for adjudication, "to be determined on the record after an opportunity for an agency hearing." In *Marathon Oil v. Environmental Protection Agency,* 564 F.2d 1253 (9th Cir. 1977), the Ninth Circuit considered whether applicants were entitled to formal hearings that adhere to the requirements of 5 U.S.C. §§ 554, 556, and 557 (Appendix pp. 35a-37a). In its reasoning, the court noted in considering the applicability of the APA that "Congress recognized that certain administrative decisions closely resemble judicial determinations and in the interest of fairness require similar procedural protections." *Id.* at 1261. An order of an administrative agency adjudicating rights or directing someone to do or refrain from doing something must be based on a hearing after due notice. *Hoxsey Cancer Clinic v. Folsom,* 155 F.Supp 376 (D. D.C. 1957).

The ICC's acceptance of and reliance upon the unsupported and baseless statistics provided by Hover and contested by Michigan, along with the ICC's rejection of Michigan's thorough factual filings, foreclosed effective judicial review of the agency's final decision according to the arbitrary and capricious standard "of the APA." *US Lines v. Federal Maritime Comm.,* 584 F.2d 519, 541 (D.C. Cir. 1978)v; see also 5 U.S.C. § 706(2)(A) (Appendix p. 38a). In addition, the APA clearly con-

templates that a reviewing court must determine whether an agency has complied with applicable procedural requirements in reaching its decision. Michigan urges that the ICC's failure to provide even the rudiments of a hearing and fair procedures established that the ICC's order herein was clearly reached "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

CONCLUSION

The decisions below dismantle Michigan's and the several states' ability to effectively regulate intrastate transportation provided by motor carriers and all but ignore the fact that regulation of motor carriers, as envisioned by Congress, is a *dual* (federal-state) regulatory scheme. As such, the decisions below result in the *de facto* preemption of Michigan laws regulating motor carriers. Through an expansive reading of its own powers, the ICC has contravened controlling precedent of this Court and the plain meaning of 49 U.S.C. § 10521(b).

PRAYER FOR RELIEF

WHEREFORE, this Court should grant certiorari to review the decisions of the ICC and the United States Court of Appeals for the Sixth Circuit and these decisions should be vacated, or in the alternative, this case should be remanded to the

ICC, as was recommended by Circuit Judge Wellford in his separate opinion below.

Respectfully submitted,

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Dated: December 7, 1990

APPENDIX

U.S.C. as was recommended by Circuit Judge [illegible] in his separate opinion below.

Respectfully submitted,

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Dated: December [illegible], 1986

APPENDIX

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APPENDIX

NOS. 89-3383/3401/3414

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALLIED DELIVERY SYSTEM, INC.;

(89-3383)

ALVAN MOTOR FREIGHT, INC.; TNT HOLLAND MOTOR EXPRESS, INC.,; AND PARKER MOTOR FREIGHT, INC.,

(89-3401)

and

STATE OF MICHIGAN; and MICHIGAN PUBLIC SERVICE COMMISSION,

(89-3414)

Petitioners-Appellants,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents,

HOVER TRUCKING COMPANY OF MICHIGAN,

Respondent-Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

Decided and Filed July 26, 1990

BEFORE: **WELLFORD** and **NELSON**, Circuit Judges, and **EDWARDS**, Senior Circuit Judge.

PER CURIAM. The petitioners, several intrastate Michigan trucking companies and the state agency regulating such carriers, seek review of an Interstate Commerce Commission decision holding that because certain Michigan-to-Michigan traffic of respondent Hover Trucking Company is routed through a terminal in Indiana, the traffic is interstate transportation subject to regulation only by the ICC. Finding no abuse of discretion or want of substantial evidence to support the ICC's decision, we shall deny the petitions for review.

I

For 25 years, Hover Trucking Company of Michigan had its headquarters and only terminal in Niles, Michigan, near the Indiana border. Operating under regulatory authorization from the Michigan Public Service Commission ("PSC"), Hover functioned mainly as a local connecting line for interstate carriers in southwest Michigan and northern Indiana.

Hover began to expand its operations in 1979, after coming under new ownership, and it received expanded authorizations from the PSC and the ICC. In 1982 Hover established a terminal in Grand Rapids, Michigan. Again it received the requisite expanded authorization from the PSC.

Hover acquired a 48-state authorization from the ICC in 1983, at which time the company moved its headquarters to a larger facility in South Bend, Indiana. Hover's president told a newspaper reporter that the move to South Bend would enable the company to serve Michigan customers without obtaining authority from the PSC. Hover subsequently moved into an even larger terminal in South Bend, and added additional "satellite" terminals in Michigan.

Hover now operates 25 terminals in Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan. The South Bend terminal serves as a break-bulk terminal, or "hub." Freight is collected and consolidated at Hover's "satellite" terminals, shipped to the South Bend terminal for sorting, and then shipped to a satellite terminal near its destination. Under this system some shipments from one point in Michigan to another point in Michigan are routed through South Bend.

Concerned that Hover was soliciting intrastate shipments in Michigan for which it had no authority, the PSC investigated Hover in 1987. The president of Hover claimed that only shipments made under PSC authority went directly between points in Michigan without passing through the Indiana terminal. However, evidence revealed that this was not invariably the case, and some shipments that purportedly went through the South Bend terminal actually never left Michigan. Hover stipulated that such shipments occurred during 1986 without PSC intrastate authorization, and the company agreed to cease those activities. There is no evidence that such shipments continued thereafter.

Nevertheless, believing that Hover's shipments through South Bend were merely a subterfuge to avoid state regulation, the PSC filed a complaint against Hover with the ICC, seeking to stop Hover's service between points in Michigan even if routed through Indiana. The complaint alleged that Hover routed its Michigan-to-Michigan shipments through South Bend in bad faith, that Hover did not have a legitimate business purpose for routing such shipments through South Bend, that the routings were unnecessarily circuitous, and that the "intrastate" traffic routed through South Bend was not incidental to Hover's interstate operations. Petitioners Allied Delivery Systems, Inc., Alvan Motor Freight, Inc., TNT Holland Motors Express, Inc., and Parker Motor Freight, Inc., all of which claimed to have lost intrastate business to Hover, joined the challenge to Hover's operations.

The ICC found that Hover's shipments from points in Michigan through South Bend to other points in Michigan represented interstate commerce not subject to PSC regulation. In determining that Hover's operations were not a "subterfuge" to avoid intrastate regulation, the Commission found that: (1) the interstate routing of Hover's shipments was not unduly circuitous when compared with the routes of intrastate carriers; (2) there was economic justification for such routing apart from Hover's lack of intrastate authority; and (3) the traffic that would otherwise be intrastate was a small proportion of Hover's overall operations.

II

Congress gave the ICC jurisdiction over interstate transportation, 49 U.S.C. § 10521(a), but forbade it in most cases to regulate intrastate transportation. 49 U.S.C. § 10521(b). Congress also expressed a desire that the ICC cooperate with the states in regulating transportation. 49 U.S.C. § 10101(a)(5).

The statute defines neither "interstate" nor "intrastate" commerce. See 49 U.S.C. § 10102. The pre-1978 version of the Interstate Commerce Act, however, defined "interstate commerce" as "commerce between any place in a state and any place in another state or between places in the same state through another state." 49 U.S.C. § 303(a)(10)(repealed). Congress deleted this definition when it revised the Act in 1978, but incorporated identical language in the section delineating the ICC's jurisdiction:

> "[T]he Interstate Commerce Commission has jurisdiction over transportation by motor carrier. . .
> (1) between a place in —
> (A) a state and a place in another state;
> (B) *a state and another place in the same state through another state;* . . . ."

49 U.S.C. § 10521(a) (emphasis added). See also H.R.Rep. No. 1395, 95th Cong., 2d Sess. 219 (1978) (Master Disposition Table showing that § 303(a)(10) was incorporated into § 10521), *reprinted in* 1978 U.S.Code Cong. & Admin. News 3009, 3228, and *table reprinted in* 49 U.S.C.A. Suppl. 816, 821 (1990); H.R. Rep. No. 1395 at 247 (table of Laws Omitted and Repealed indicating that the definition of "interstate operation" contained in § 303(a)(20) was deleted as "unnecessary" because "[t]he chapter on jurisdiction [§§ 10521 *et seq.*] specifies what is meant by interstate commerce"), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3009, 3256, and *table reprinted in* 49 U.S.C.A. Suppl. 848, 849 (1990). The PSC has presented neither caselaw nor statutory support for the proposition that the statute permits the ICC to regulate the transportation described in § 10521(a)(1)(B) only so long as it does not interfere with a state's regulation of intrastate transportation. The ICC was well within its jurisdiction.

III

The decision of the Commission should not be set aside by this court unless it is unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A) and (E). As this court has explained:

> "If the agency considers the relevant factors and articulates a rational connection between the facts found and the choice made, the decision is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and will be upheld if supported by substantial evidence." *Film Transit, Inc. v. ICC*, 699 F.2d 298, 300 (6th Cir. 1983), citing *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

As discussed above, it is clear that transportation beginning and ending in the same state but passing through another is

interstate commerce. It is equally clear, however, that a carrier may not in "bad faith" use interstate routings as a "subterfuge" to avoid state regulation. *Pennsylvania Public Utility Com'n v. Arrow Carrier Corp.*, 113 M.C.C. 213, 219 (1971) ("*Arrow*"), *aff'd sub nom. Pennsylvania Public Utility Com'n v. United States*, 1973 Fed. Carr. Cas. (CCH) ¶ 56206 (M.D.Pa. 1973), *aff'd per curiam*, 415 U.S. 902 (1974). *Accord, Gray Lines Tour Co. of Southern Nevada v. ICC*, 824 F.2d 811, 814 (9th Cir. 1987).

The petitioners in the case at bar charge that Hover uses its South Bend terminal in bad faith to avoid state regulation of Michigan-to-Michigan freight, thereby allowing it to offer lower rates than those established by the PSC for intrastate transportation. The complainant has the burden of proof on such an issue, of course. *Missouri Public Service Com'n v. Missouri Arkansas Transp. Co.*, 103 M.C.C. 641, 649 (1967).

As the Commission has observed, "[f]ixing the line between a legitimate interstate operation and a bad faith scheme to avoid state regulation has always been a difficult task." *Arrow*, 113 M.C.C. at 221. The efficiency of an operation is not controlling, but it does shed light on a carrier's *bona fides*. *Service Storage and Transfer Company, Inc. v. Virginia*, 359 U.S. 171, 176 (1959). Recognizing this, the Commission will usually test good faith by examining the efficiency or reasonableness of the carrier's actions:

> "The Commission and the courts, in most cases involving an alleged subterfuge, will compare the efficiency of the direct and the circuitous routes. Such a comparison is not the sole test of good faith. *Service Storage and Transfer Company, Inc. v. Virginia*, [359 U.S. 171, 176 (1959)]. However, it is usually the best indicator of the carrier's intent because without some compelling reason, a carrier would normally seek and use the most efficient routes available." *Rock Island Motor Transit Co. v. Watson-Wilson*

Transp. System, Inc., 99 M.C.C. 303, 307 (1965), *aff'd sub nom. Rock Island Motor Transmit Co. v. United States*, 256 F.Supp. 812 (S.D. Iowa 1966).

Here the Commission considered each of three factors identified in Arrow as relevant: (1) the degree of "circuity" involved in the questioned route when compared with the local route normally employed by intrastate carriers; (2) the economic or operational justification for such routing; and (3) the proportion of the carrier's overall operation accounted for by the questioned traffic. *Arrow*, 113 M.C.C. at 220.

There is substantial evidence to support the ICC's conclusion that Hover's operation passes muster under Arrow. "No single factor is controlling," *id.*, but it is logical that the importance of the circuity factor should vary in inverse proportion to the strength of the economic or operational justification for the routing.

Spoke-and-hub traffic patterns often improve efficiency by decreasing unused capacity. Overnight couriers and airlines provide the best-known examples, but the ICC has long recognized that the use of such patterns may promote the efficient movement of less-than-truckload-lot shipments of freight. *See Rock Island*, 99 M.C.C. at 306; *Missouri Public Service Com'n v. Missouri-Arkansas Transp. Co.*, 103 M.C.C. 641, 647 (1967); *Maudlin v. Southwest Delivery Co.*, No. MC-C-10930, 1985 Fed. Carr. Cas. (CCH) ¶ 37,198 (Nov. 15, 1985), *aff'd without op.*, 835 F.2d 1435 (9th Cir. 1987).

Of course, "the mere assertion that operating efficiencies flow from a circuitous operation is not enough." *Rock Island*, 99 M.C.C. at 307. The ICC looked closely at the economic and operational advantages of Hover's spoke-and-hub system, and found that the nightly volume of intrastate shipments between any two of Hover's Michigan terminals would be only 1,000 to 7,500 pounds. This would not be enough to support nightly

direct runs. The average trailer load into or out of South Bend, in contrast, was 22,000 pounds. Hover's spoke-and-hub traffic patterns enabled the company to use its trucks more efficiently, and as the ICC noted, they allowed Hover to provide overnight service between points in Michigan that would not otherwise receive it. *See Service Storage*, 359 U.S. at 176 ("the creation of this flow of traffic [less-than-truckload-lot shipments to and from a hub] is a timesaver to the shipper since there is less time lost waiting for the making up of a full truck load"). Although Hover might have been able to route a few of these Michigan-to-Michigan shipments directly (as it had in 1986 until caught by the PSC), we have no basis for rejecting the Commission's conclusion that the spoke-and-hub system was more efficient overall.

The petitioners also argue that, the Arrow test aside, the ICC erred in failing to consider the direct evidence of bad faith. Many of the cases relied on by the ICC did not involve such direct evidence. *See Service Storage*, 359 U.S. at 175; *Rock Island*, 99 M.C.C. at 312; *Jones Motor Company v. United States*, 218 F.Supp. 133, 137 (E.D. Penn. 1963), *petition for reconsideration denied*, 223 F.Supp. 835 (E.D. Penn. 1963), *aff'd sub nom. Highway Express Lines, Inc. v. Jones Motor Co., Inc.*, 377 U.S. 217 (1964) (per curiam); *Missouri Public Service Commission*, 103 M.C.C. at 648.

We are given pause by the ICC's assertion in this court that "motivation is not relevant here because the criteria set forth in Arrow, supra, have been met." As the ICC has noted elsewhere, direct evidence of bad faith is certainly relevant. See *Rock Island*, 99 M.C.C. at 307 (efficiency "is not the sole test of good faith" but is an "indicator of the carrier's intent"). And "where the matter of comparative efficiency presents a reasonably close question, the issue of lawfulness should not be determined on that basis alone." *Rock Island*, 99 M.C.C. at 316 (citing *Service Storage*, 359 U.S. at 176); *Thurston Motor Lines, Inc.*, 104 M.C.C. 1,15 (1967).

The ICC's decision makes it clear that the Commission did consider the relevant evidence. Its discussion of the "direct evidence" that was offered to show subterfuge or bad faith probably leaves something to be desired, but it was within the Commission's province to find, as it did, that the fact that Hover had admittedly engaged in illegalities was not dispositive. It was likewise within the Commission's province to find, as it did, that the statement Hover's Mr. Van Bokkem gave a newspaper reporter about the regulatory consequences of Hover's move to South Bend would not support the conclusion that the move was made solely to bring those consequences about. Where the move is adequately justified on economic grounds, we cannot say the ICC was required to find bad faith because Hover recognized the regulatory consequences as well. Nor can we say the Commission was wrong in giving the apparent efficiency of Hover's operations more weight than the direct evidence of bad faith. Substantial evidence supports the Commission's conclusion, regardless of the accuracy of its subsequent dictum on the irrelevance of motivation.

The petitions for review are **DENIED.**

WELLFORD, Circuit Judge, **concurring in part and dissenting in part.**

I concur in the majority's conclusion concerning jurisdiction (Part II) but would augment the discussion by adding the following:

In *Rock Island Motor Transit Co. v. Watson Wilson Transportation*, 99 M.C.C. 303, 306 (1965), *aff'd*, 256. F. Supp. 812 (S.D. Iowa),[1] the Commission stated:

---

[1] It is interesting to note that Justice Blackmun, then a Circuit Judge, was one of the three judges on this panel.

> Since the Supreme Court's decision in *Service Storage and Transfer Co. v. Virginia*, 359 U.S. 171 (1959), it has been settled that the Commission's competence to interpret its own certificates extends to matters such as those involved here wherein it is alleged that Watson's interstate rights are being used as a subterfuge to evade lawful state regulation through the device of routing normally intrastate traffic across the Iowa State line and back.

The Court in *Service Storage* quoted from *Castle v. Hayes Freight Lines*, 348 U.S. 61, 63-64 (1954) as follows:

> "Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce." We pointed out that 49 U.S.C. § 312 provides "that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided'. . . . Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate."

359 U.S. at 176. The Court continued, concluding that:

> It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action. The Commission has long taken this position.

359 U.S. at 177.

The petitioners have the burden of proof in this case, as the Commission held, to show that "the considered traffic is intrastate in character" rather than interstate commerce. *Missouri Public Service Commission v. Missouri Arkansas Transportation*

Co., 103 MCC 641, 649 (1967). The petitioners failed to carry this burden.

On the question of circuity, I agree with the majority that petitioners have failed to carry their burden of proof. The Michigan Public Service Commission asserts that its data indicated a degree of circuity of 92% with respect to Hover's Michigan operations which are at issue. Petitioners claim that the ICC improperly and erroneously relied instead on a 24% circuity factor. The ICC explained its calculation in footnote 3 to its opinion:

> This figure takes into account all traffic moving to and from defendant's Michigan terminals (including traffic with origins or destinations outside Michigan). The higher circuity factor proposed by complainant only includes Michigan-to-Michigan traffic. Because all traffic moves in the same vehicles to and from South Bend, it is inappropriate to exclude arbitrarily the traffic moving ultimately to or from points outside Michigan. If defendant [Hover] has a trailer moving to or from South Bend containing traffic destined to points beyond Michigan, the degree of circuity involved in that trip cannot be analyzed properly by excluding that traffic.

J/A at 12 n.3.

Petitioners complain that this is a "new approach to determining circuity" or a "total departure" and is "wrong." MPSC Brief at 18; Allied Brief at 9. Allied also complains about the ICC's statement that "[c]ircuity ... does not play a major role in evaluating whether a LTL carrier's operation across a State line is reasonable and logical." J/A at 11. Allied argues also that the proof shows that "Michigan to Michigan service conducted by Hover . . . comprised 59% of Hover's overall number of shipments" during a study period, and that 75% of Hover's revenues were "derived from shipments with an origin or destina-

tion or both *within the State of Michigan.*" Allied Brief at 9-10 (emphasis is original).

ICC has the responsibility to make the factual determinations concerning circuity. *Eichholz v. Public Service Commission*, 306 U.S. 268, 274 (1939). It has the duty then to consider all the evidence submitted on this question, to analyze it, and to make a decision about the degree of circuity involved, and which factors and data bear most heavily upon that determination. I am in agreement that we should not disturb the ICC findings on degree of circuity even if we entertain some doubt about the logic of its approach and even if the method utilized in this case is a new and total departure from its prior approach to calculation the degree of circuity, unless this calculation and approach may be shown to be arbitrary and capricious with respect to review of ICC orders.

I have concern, however, with respect to the conclusion reached by the ICC that the circuity factor "does not play a major role" in the evaluation process of whether or not subterfuge is present. The Supreme Court affirmed a three-judge court decision, *Jones Motor Co. v. United States*, 218 F. Supp. 133 (E.D. Pa. 1963), *sub nom*, in *Highway Express Lines, Inc. v. Jones Motor Co.*, 377 U.S. 217 (1964) (per curiam), setting aside an ICC determination of subterfuge based solely on circuity. Jones, however, does not translate into a conclusion that circuity is not a major or principal factor, though not the sole or predominant one, in deciding whether or not a motor carrier has engaged in subterfuge. It was described as a "significant factor" in *Pennsylvania Public Utilities Commission v. Arrow Carrier Corp.*, 113 MCC 213 (1971), *aff'd* 1973 Fed. Carr. Cas. 419 (M.D. Pa. 1973) (three judge court), *aff'd mem.*, 415 U.S. 902 (1974). I agree with this description and would hold that, in a case of this nature, the factor of circuity is substantial and must be given full consideration, together with the other factors herein discussed, in determining the question of bad faith or subterfuge.

I would, then, remand this matter to the ICC for reconsideration of the question of circuity as having a *significant role*, rather than denigrating it as "not a major" one. I would expect also that upon remand ICC would explain its rationale for its new approach in calculating the degree of circuity in order to demonstrate that is methodology on circuity is not arbitrary and capricious but rather rational.

I am in agreement also with the majority's discussion of economic or operational justification for the ICC's decision under review. It is important to remember that Hover is an LTL carrier, one which handles many "less than truckload shipments in Michigan and in other states." It described its method of operation and the Commission essentially found it to be functionally efficient and logical.

> Hover currently operates a break-bulk operation. Its main hub facility is located in South Bend, Indiana. Hover operates by collecting freight from the originating points by peddle runs. Such freight is first consolidated at Hover's satellite terminals and then line-hauled to the central South Bend terminal. After being sorted, individual packages are line-hauled back out to the satellite terminals closest to their ultimate destinations, where they are then delivered via peddle runs.

Thus, the Commision correctly found that Hover's method of operation was justified.

My disagreement with the majority relates to the question of bad faith in this case. The latest statement of the tests for bad faith may be seen in *Corporation Commision of Oklahoma v. Film Transit, inc.*, MC-C-10802 (3/10/82):

> The tests to determine whether transportation between two points in the same State performed through a point in another State is truly interstate in nature or a subterfuge to

> avoid State regulation are set forth in *Pennsylvania P.U.C. v. Arrow Carr. Corp.*, 113 M.C.C. 213, 219 (1971), affirmed *Pennsylvania P.U.C. v. United States*, 1973 F. Carr. Cas. 82, 419 (M.D. Pa. 1973), (*Pennsylvania*). The Commision and the Courts have looked to the "reasonableness" of a carrier's *modus operandi*, as evidenced by (1) the degree of circuity involved in the interstate route when compared with the local route normally employed by the intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority and desire to transport otherwise unavailable traffic, and (3) the incidental or dominant character of the intrastate traffic as a portion of the carrier's operation.

Slip Op. at 2.

Most of the cases cited by the parties do not involve concrete evidence of bad faith actions which indicate directly, rather than through inference, that a carrier has sought to evade a particular state regulatory control. Analysis of the tests, then, is the means used by the Commission and the courts to determine whether there is subterfuge. In this case, ICC took note that "Hover acknowledges the *unlawful operations* it permitted in 1986 . . ." J/A at 10. In its brief, MPSC argues, moreover, that "Hover continued to provide false documentation and affidavits containing falsified information to make the direct Michigan to Michigan shipments appear as though they had been routed through South Bend, Indiana." MPSC Brief at 26. ICC makes no mention of these charges, simply observing that Hover instituted procedures "to ensure that such movements never occur again." J/A at 10. Mr. Van Bokkem testified also regarding an incident bearing on this position:

> Q. Mr. Van Bokkem, do you ever recall telling a newspaper reporter that by moving your facilities from Niles to South Bend that you could in fact serve the State of Michi-

gan without holding authority from the Michigan Public Service Commission?

A. I said something to that effect, yes.

Q. And would you have said that in about 1983?

A. That would have been 1983, yes.

Q. Who was the reporter that you spoke to at that time?

A. I don't know. It was some local paper.

J/A at 67-68.

This testimony might be taken as some evidence of an intent to subvert or evade regulation by Michigan authorities, which is material to an inquiry about subterfuge. ICC, however, in its opinion, makes this observation concerning this Van Bokkem statement, which petitioners claim is part of the evidence "that Hover's sole purpose in moving ... was to avoid MPSC regulation." J/A at 13.

> In any event, *motivation is not relevant* here because the criteria set forth in *Arrow, supra*, have been met.

Id. (emphasis added).

I am at a loss to understand this part of the ICC's conclusions in this controversy. Evidence of bad faith is, indeed, highly relevant to any ultimate determination of subterfuge to circumvent legitimate state regulation. I am aware that in another part of the ICC opinion at issue the Commission finds that the Van Bokkem statement "does not form any basis ... to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation." *Id.* Absent the conclusion that "motivation is not relevant," perhaps ICC has chosen a rational explanation for Van Bokkem's admission. I am persuaded, however, that there should be a remand to the ICC for a clear explanation of its rationale concerning the al-

leged "bad faith" actions of Hover which, are the focus of much of petitioners arguments, recognizing that "no single factor" is controlling.

I would **DISSENT**, therefore, to the extent that I believe a **REMAND** is required for further clarification and explanation by ICC on the circuity and direct evidence of "bad faith" questions in this case.

NO. *89-3383/3401/3414*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLIED DELIVERY SYSTEM, INC. (89-3383), ALVAN MOTOR FREIGHT, INC; TNT HOLLAND MOTOR EXPRESS, INC.; AND PARKER MOTOR FREIGHT, INC., (89-3401), and STATE OF MICHIGAN; and MICHIGAN PUBLIC SERVICE COMMISSION (89-3414),	
Petitioners-Appellants,	
v.	
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,	
Respondents,	
HOVER TRUCKING COMPANY OF MICHIGAN,	
Respondent-Intervenor.	

Filed *September 10, 1990*

BEFORE: WELLFORD and NELSON, Circuit Judges; and EDWARDS, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original

panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30092

MICHIGAN PUBLIC SERVICE COMMISSION
v.
HOVER TRUCKING COMPANY OF MICHIGAN

Decided: March 3, 1989

By complaint filed under 49 U.S.C. 11701 on March 21, 1988, as amended, Michigan Public Service Commission (MPSC or complainant) seeks a finding that operations by Hover Trucking Company of Michigan (Hover or defendant) from origins in Michigan to destinations in Michigan moving through Hover's South Bend, IN break-bulk and consolidation facility are not lawfully conducted pursuant to its interstate au-

thority, but are instead shipments moving in intrastate commerce. Complainant seeks various additional relief if we determine that these operations are in intrastate commerce. By decision served May 17, 1988, the proceeding was set for handling under the modified procedure and Regular Common Carrier Conference (RCCC) and Allied Delivery System, Inc. (Allied), individually, and Alvan Motor Freight, Inc., Central Transport, Inc., TNT Holland Motor Express, Inc., and Parker Motor Freight, Inc. (Alvan), jointly, were permitted to intervene in support of MPSC. Complainant and intervenors Allied, RCCC, and Alvan have filed opening statements, Hover has replied, and the former have filed rebuttal materials.

PRELIMINARY MATTERS

Intervenor Allied moves to strike Appendix C to defendant's statement and the references to it in the statement. This material describes the nature of Allied's handling of less-than-truckload (LTL) traffic through break-bulk terminals. Hover replied to the motion. Allied correctly points out that its handling of this traffic is not relevant to the lawfulness of defendant's operations. Accordingly, the motion will be granted and the material stricken from the record.

Complainant and intervenors Alvan and RCCC move to strike portions of the statement by Hover witness Tony Van Bokkem describing an opinion by a Commission field auditor concerning the lawfulness of Hover's operations. Hover replied to the motion. This motion goes more to the weight to be afforded the evidence than to its admissibility. Therefore, the motion will be denied.

Finally, Hover moves to strike: (1) a portion of the statement of Catherine Fisher, submitted as Appendix B to complainant's rebuttal, in which she testifies as to facts based on statements made to her by a former driver for a Hover agent; (2) a portion of complainant's rebuttal brief containing evidence derived

from a computer study that it claims does not support the testimony given; and (3) assertions in the rebuttal arguments of complainant and intervenor Alvan concerning average daily traffic volumes between individual Hover terminals in Michigan that it contends are not derived from the evidence of record. Complainant and intervenor Alvan replied to the motions. Embraced within complainant's and Alvan's replies are motions to strike Hover's motions. Hover replied to each motion. Hover's three motions to strike will be denied as, once again, they go more to the weight to be afforded the evidence than to its admissibility. In view of our action, the motions to strike Hover's motions are moot.

BACKGROUND

Hover holds nationwide authority to transport general commodities in Certificate No. MC-101619. Prior to 1979, Hover conducted operations as a local interline carrier in southwest Michigan and northern Indiana. Hover's operations were performed through a single terminal located in Niles, MI, and Hover served primarily as a connecting line for longer haul carriers.

In 1979, Tony Van Bokkem and two other individuals assumed control of Hover. During these initial years, large portions of Hover's traffic continued to consist of interline freight moving in interstate commerce. Hover picked up or delivered freight in southwest Michigan and northern Indiana using its terminal at Niles, and it interlined freight with other carriers at South Bend. Hover then expanded its own single-line operations. By late 1982, Hover states that it outgrew its existing terminal at Niles, which had 20 doors and 3,000 square feet of platform space. In June 1983, Hover moved to a facility in South Bend with 37 doors and over 12,000 square feet of dock space. In June 1985, Hover moved to its present South Bend facility. It is even larger, with 48 doors and over 20,000 square feet of platform space.

During this period of expansion, Hover established a network of agency terminals that provided local pickup and delivery services for its freight within their respective territories. Hover has three such terminals in Wisconsin, one in Kentucky, six in Illinois, four in Indiana, three in Ohio, and seven in Michigan.

With this expansion, Hover continued its service pattern of moving traffic through its headquarters' break-bulk and consolidation facility at South Bend. Shipments picked up by Hover (through the operations of agents) were brought to the agents' facilities, loaded onto trailers moving to South Bend, sorted at South Bend onto trailers moving to the appropriate destination agency terminals, and ultimately delivered by the destination agents. This method of service assertedly allowed Hover to avoid inefficient movements of small amounts of freight between individual terminals by combining all over-the-road movements into one or more trailers moving to South Bend, thus enabling Hover to offer overnight service within its area of operation.

Complainant contends that, by transporting freight between Michigan points through its South Bend facility, Hover provides extremely circuitous transportation services. Complainant contends that this is not a *bona fide* interstate operation and is conducted in bad faith as a subterfuge to escape Michigan jurisdiction. It argues that Hover's service between Michigan points is unlawful, unreasonable, and an abuse of its ICC certificate.

MPSC submitted a March 1988 study of Hover's operations conducted by Rodney F. Krietemeyer of the Michigan State Police. According to this study, moving shipments with a Michigan origin and destination through South Bend resulted in a

circuity factor of 92 percent.[1] Complainant asserts that this traffic is the dominant part of Hover's overall operations, that there is no economic or operational jurisdiction in routing the traffic through South Bend, and that it results in costs exceeding revenues.

Complainant contends that Hover's sole purpose in relocating its terminal headquarters from Niles to South Bend was to enable it to offer substantial discounts on freight moving from Michigan origins to Michigan destinations pursuant to its interstate tariff. Hover's interstate rates are assertedly up to 40 percent lower than Michigan intrastate rates. Complainant further notes that, in a complaint proceeding before MPSC, Hover admitted that it had transported some shipments from Michigan origins to Michigan destinations without first moving the shipments through South Bend (or otherwise across State lines), and without the requisite MPSC operating authority.

In a statement appended to complainant's brief, Catherine Fisher, an officer with the Michigan Department of State Police Motor Carrier Division, states that she interviewed a driver for Hover's agency terminal in Manton, MI who stated that direct runs of full trailerloads of freight moved from Manton to Flint, MI without first moving through Hover's South Bend facility. MPSC also includes a study by Glenn L. Fast, a transportation consultant, of 14 Michigan to Michigan shipments moving through South Bend that assertedly were noncompensatory because of the circuity. Finally, Sittichai Anprasert, an economic analyst with MPSC, indicates on behalf of MPSC that, during 1988, "Michigan intrastate truck shipments" were responsible for 14.72 percent of Hover's systemwide operating revenues.

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[1] This means that the mileage involved in a movement through South Bend is, on the average, 92 percent greater than the mileage involved in a direct movement between the involved points.

Intervenor Allied expresses its concern over business lost to interstate carriers, such as Hover, whose routing traffic out-of-State enables them to charge lower, interstate rates. RCCC believes that Hover's admission of past unlawful operations demonstrates that its operations through the South Bend terminal are inefficient. Alvan also focuses on Hover's past unlawful operations, which, it argues, warrant a finding that the routing of traffic through South Bend is merely a subterfuge to avoid MPSC regulation.

In reply, Hover notes that its operating system has evolved into a system similar to the break-bulk systems of other carriers with which Mr. Van Bokkem was familiar. Hover is able to maintain close control over all its shipments because the freight is handled through one terminal facility. All vehicles are based at that facility, and all freight pickups are returned to that facility for transfer onto delivery vehicles for the next day's operation. When it began to establish agency stations, the pattern of moving all freight through the South Bend terminal continued. Agents do not become involved in the preparation of paperwork, dispatch, and other shipment responsibilities which, assertedly, are best performed by headquarters' personnel. The agent's sole function is to pick up freight and load it unsorted onto line-haul trailers moving to Hover's main terminal.

Hover notes that its use of a break-bulk and consolidation terminal as a gathering point for freight moving throughout its system ensures that it will be able to load that freight onto units outbound from South Bend and reach all of its destination terminals by the following morning. Hover thus avoids holding freight at an origin terminal because of lack of sufficient volume on a particular evening to move it to a particular destination terminal. It also avoids the problem of low freight density between its individual terminals. Hover finds it more efficient and economical to load line-haul vehicles to maximum capacity and make full-volume round trip runs to and from South Bend

than to have these vehicles fan out between individual terminals at less than full capacity.

Hover further notes that the design of its system is similar to that of many other carriers, particularly those concentrating on the movement of packaged or LTL freight. In LTL operations, the critical factor is said to be not the number of miles a particular shipment travels, but the carrier's overall cost of transporting all of its shipments.

Hover states that it lacks sufficient freight volume between terminals to support a nightly trailer dispatch service at each. The largest average volume between any of these terminal combinations is slightly in excess of 7,500 pounds nightly in each direction, while volumes for other combinations are as little as 1,000 pounds nightly, in each direction. Hover avers that it would be impossible to sustain a system of direct runs between these individual terminals given such volumes. By contrast, aggregating all freight moving to and from the Michigan terminals into combined loads to or from South Bend results in an average trailer load factor of 22,000 pounds. The average two-way flow of traffic between the Michigan terminals and the South Bend consolidation facility ranges between 30,000 and 80,000 pounds per terminal. When these economies are extended across the breadth of Hover's system, use of its South Bend facility is said to reduce both the total vehicle miles traveled and the number of vehicles operated.

Responding to MPSC's circuity calculations, Hover notes that the study focuses only on the traffic moving to and from its Michigan terminals that has both an origin and destination in Michigan, but that it ignores the large volume of shipments moving to and from points outside Michigan through South Bend. According to Hover, a more realistic analysis of circuity focuses on the total traffic moving to or from these terminals. By thus considering the total number of shipments moving between terminals, the circuity factor is reduced from 92 to 24 percent.

In response to MPSC's allegations that the Michigan-to-Michigan traffic constitutes a significant portion of its systemwide traffic, Hover calculates, based upon MPSC's March 1988 traffic study, that only 9.94 percent are shipments which, but for the move through its South Bend facility, would otherwise be intrastate.

Hover acknowledges the unlawful operations it performed in 1986 and details the procedures that it instituted to ensure that such movements never occur again. It also submits a verified statement from its agent at the Manton terminal that indicates that the direct runs between Manton and Flint alleged by MPSC were not made by Hover, but by a Canadian carrier.

In rebuttal, complainant concedes that it neglected to exclude certain interline shipments from the intrastate portion of its traffic study, thereby inflating the overall percentage of shipments by Hover that complainant claimed to be intrastate in its opening statement (although it also claims a minor discrepancy in defendant's methodology). Allied and Alvan attack the efficiency of Hover's South Bend terminal operations and propose other methods of handling this traffic on a purely intrastate basis. Finally, RCCC argues that Mr. Van Bokkem is not a credible witness because of a discrepancy between an affidavit he submitted in the underlying MPSC proceeding and a stipulation and agreement he signed in that proceeding concerning the routing of shipments transported during 1986. This discrepancy is said to impeach Mr. Van Bokkem's credibility.

DISCUSSION AND CONCLUSIONS

It is well settled that the burden of proof in a complaint proceeding alleging unlawful operations is on the complainant. *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. 303 (1965); *Missouri Pub. Ser. Comm.* v. *Missouri Arkansas Transp. Co.*, 103 M.C.C. 641 (1967). Moreover, it is long established that, subject to the exception discussed below, the

transportation of property by motor vehicle between points in the same State, through another State, is transportation in interstate commerce subject to the jurisdiction of this Commission, and that transportation crossing a State line is always in interstate commerce, regardless of how small a distance may be traversed in the other State. *See* 49 U.S.C. 10521(a)(1)(B); *Greyhound Lines* v. *Mealey*, 334 U.S. 653, 660-661 (1948).

The theory of the complaint in this case is based on the principle that a carrier may not use its interstate operating authority to evade legitimate State regulation of intrastate commerce. Transportation provided between points in the same State through another State is unlawful and beyond the scope of a carrier's interstate operating authority when it is conducted as a subterfuge to avoid State regulation or in bad faith. The leading case in this area is *Pennsylvania P.U.C.* v. *Arrow Carrier Corp.*, 113 M.C.C. 213 (1971) (*Arrow*).

In determining whether bad faith or subterfuge is involved, the Commission and courts generally look to the reasonableness of the carrier's manner of operations, as evidenced by: (1) the degree of circuity involved in the interstate route when compared with the routes of intrastate carriers; (2) the presence or absence of economic or operational jurisdiction for such routing apart from a carrier's potential lack of intrastate authority or, if relevant, desire to transport otherwise unavailable traffic; and (3) the relationship of the traffic which would otherwise be intrastate traffic to the carrier's overall operations. No single factor is controlling, nor is there any presumption in favor or against any one. *Arrow, supra*, at 220.

We previously have recognized that the first *Arrow* test, circuity, does not play a major role in evaluating whether a LTL carrier's operation across a State Line is reasonable and logical. In *Rock Island, supra*, we held that, where LTL traffic is concerned, circuity alone cannot determine the lawfulness of an operation, because a circuitous operation through a consolida-

tion terminal can be more logical and efficient than a more direct operation. In *Missouri, supra*, we similarly recognized that, as a matter of economic and practical necessity, LTL traffic generally must be handled through terminals for consolidation and break-bulk, notwithstanding that this often results in circuitous routing.[2]

In any event, the degree of circuity in Hover's operations is well within the degree of circuity previously found to be acceptable. We find that the appropriate circuity factor is 24.2 percent.[3] This amount is well within the 74.9 percent circuity factor found to be acceptable in *Jones Motor Co.* v. *United States*, 218 F. Supp. 133 (E.D. Pa. 1963), *aff'd on rehearing*, 223 F. Supp. 835 (E.D. Pa. 1963), *aff'd per curiam sub nom., Highway Express Lines* v. *Jones*, 377 U.S. 217 (1964), *rehearing denied sub nom., Pennsylvania Pub. Util. Comm.* v. *Jones Motor Co., Inc.*, 377 U.S. 984 (1964). Accordingly, we conclude that the circuity of operation experienced by Hover in moving shipments to and from its South Bend break-bulk facility is an ordinary and routine facet of the business of transporting less-than-truckload shipments of general commodities through such a facility.

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[2]

Developments since 1980 in both trucking and air freight and passenger service indicate the increasing use of "hub" operations such as Hover's to increase traffic density and lower overall cost.

[3]

This figure takes into account all traffic moving to and from defendant's Michigan terminals (including traffic with origins or destinations outside Michigan). The higher circuity factor proposed by complainant only includes Michigan-to-Michigan traffic. Because all traffic moves in the same vehicles to and from South Bend, it is inappropriate to exclude arbitrarily the traffic moving ultimately to or from points outside Michigan. If defendant has a trailer moving to or from South Bend containing traffic destined to points beyond Michigan, the degree of circuity involved in that trip cannot be analyzed properly by excluding that traffic.

As to the operational jurisdiction for Hover's use of its headquarters' consolidation terminal at South Bend, we have recognized repeatedly that operating through a consolidation terminal is a reasonable manner of transporting LTL, general-commodity traffic, even when it involves moving single-State traffic through a terminal in another State. In *Rock Island, supra* at 306 and 311, it was recognized that circuity alone cannot determine the lawfulness of an operation, because operations through a consolidation terminal are natural and logical, and more efficient than direct operations with respect to such traffic. In *Missouri, supra* at 674, it also was acknowledged that, as a matter of economic and practical necessity, LTL traffic generally must be handled through terminals for assembly, consolidation, and distribution, notwithstanding that this often results in circuitous routings. In *Pennsylvania Public Utility Comm.* v. *Leonard Exp.*, 107 M.C.C. 451, 456 (1968), it was stated that a logical and normal operation through the carrier's headquarters or base of operations is a prime justification for an interstate routing, and counterindicatory of subterfuge to avoid State regulation.

We also note that the finding of subterfuge in *Haley, P.U.C. of Oreg.* v. *City Transfer*, 112 M.C.C. 80 (1970), rested, in large measure, on the fact that the interstate operation was not through the carrier's headquarters or base of operations in the other State, but rather commenced or terminated at its headquarters in the same State in which the challenged traffic was picked up and delivered. Here, we note that the South Bend location for defendant's facility is a logical choice considering the fact that Hover's operations encompass the six-State area of Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan. Geographically, South Bend is centrally located in this area.

Complainant avers that Hover's sole purpose in moving its headquarters to South Bend was to avoid MPSC regulation. It bases this conclusion upon a statement by Mr. Van Bokkem to a newspaper reporter at the time of the move in which he ac-

knowledged that, in moving to South Bend, Hover could serve Michigan without holding MPSC authority. This does not form any basis for us to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation. In any event, motivation is not relevant here because the criteria set forth in *Arrow, supra*, have been met.

We find the assembly of Hover's Michigan freight into combined inter-terminal loadings to and from South Bend a logical solution for a carrier that has relatively light volumes of freight moving between most of its individual terminals. The evidence shows that Hover lacks sufficient freight volume between its Michigan terminals to establish a system of regular direct runs between those terminals. Of the various combinations of Michigan terminals, the largest average two-way volume is some 7,500 pounds nightly in each direction. Volumes for other traffic lanes between Michigan terminals are as low as 1,000 pounds nightly in each direction. Direct, over-the-road movements between individual terminals generally would not be economically feasible with such small volumes of freight.

By contrast, when Hover consolidates trailerloads for movements to or from South Bend, its average trailer load factor is approximately 22,000 pounds. This system gives Hover the advantage of scale economies generated *both* by the aggregation of traffic moving between Michigan terminals and with the much larger volume of traffic moving between these terminals and points outside of Michigan. Additionally, it allows Hover to provide overnight service on much traffic that otherwise would not receive it.

Consequently, we conclude that Hover's use of its South Bend facility is a reasonable, logical, and normal way of handling LTL traffic.

Finally, concerning the incidental or dominant nature of the

single-State traffic involved, we are presented with various figures from the parties describing the single-State traffic as a percentage of systemwide revenues, as a percentage of systemwide shipments, and as a percentage of total weight. The percentage of systemwide shipments which would otherwise be unauthorized if moved direct rather than through its South Bend facility most accurately reflects the relative amount of single-State, in relation to system-wide transportation. This calculation takes into account adjustments for single-State shipments interlined with other carriers at points outside of Michigan and shipments between points in Michigan that Hover is authorized to serve under its MPSC authority. The single-State shipments constitute 9.94 percent of system-wide shipments. This figure is well within the calculation in *Jones, supra*, where 16.9 percent of systemwide shipments was found to constitute an incidental amount.

In summary, we find that complainant has failed to establish that defendant routes traffic moving between points in Michigan through South Bend as a subterfuge to transform intrastate traffic into interstate traffic so as to avoid Michigan's regulatory jurisdiction.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Allied's motion to strike Appendix C to defendant's verified statement and all references to it in that statement is granted and the material stricken from the record.

2. The remaining motions to strike filed by complainant, defendant, and intervenors are denied.

3. This proceeding is discontinued.

4. This decision is effective on its date of service.

By the Commission, Chairman Gradison, Vice-Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

Noreta R. McGee
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30092

MICHIGAN PUBLIC SERVICE COMMISSION

v.

HOVER TRUCKING CO., INC.

Decided: May 12, 1988

The Michigan Public Service Commission has filed a complaint with the Commission. The complaint has been served on defendant, and defendant has replied.[1] Alvan Motor Freight,

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[1] The complaint is against Hover Trucking Co., Inc., and this proceeding has been docketed as such. However, defendant's reply indicates that Hover Trucking Company of Michigan (formerly named Hover Trucking Co.) is the proper party. In addition, Hover Trucking Company of Michigan is affiliated with a company named Hover Trucking Company, an Indiana Corporation. If complainant agrees that Hover Trucking Company of Michigan is the proper defendant, it should so amend its complaint.

Inc., Central Transport, Inc., TNT Holland Motor Express, Inc., and Parker Motor Freight, Inc., jointly, and the Regular Common Carrier Conference and Allied Delivery System, Inc., individually have filed petitions to intervene pursuant to 49 CFR 1112.4. Petitioners seek relief identical to that sought by complainant. Defendant does not oppose their intervention. Accordingly, there is good cause to allow petitioners to intervene. Intervenors are cautioned that the issues in this proceeding may not be broadened beyond those in the complaint.

Complainant and petitioners request an oral hearing. The requests will be denied. It is not likely that disposition of the issue in this proceeding will depend upon dipsuted evidence. Therefore, an oral hearing is not warranted.

This proceeding shall be handled on the basis of written verified statements. A procedural schedule will be established sufficient for the parties to use the Commission's discovery rules (49 CFR 1114, Subpart B).

It is ordered:

1. The petitions to intervene are granted.

2. The requests for oral hearing are denied.

3. Complainant's and petitioners' statements must be filed by July 15, 1988.

4. Defendant's reply must be filed by August 15, 1988.

5. Complainant's and petitioners' rebuttal must be filed by September 6, 1988.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee
Secretary

(SEAL)

STATUTORY PROVISIONS

INTERSTATE COMMERCE ACT

49 U.S.C. § 10101. Transportation Policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and —

(1) in regulating those modes —

(A) to regulate and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

* * *

(3) in regulating transportation by motor carrier of passengers (A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objections of this subtitle; (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this subtitle; and (C) to ensure that Federal reform initiatives enacted by the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

INTERSTATE COMMERCE ACT

49 U.S.C. § 10521. General Jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier —

(1) between a place in —

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(b) This subtitle does not —

(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier.

(2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922(c)(2) of this title, allow a motor carier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a state over a motor carrier.

ADMINISTRATIVE PROCEDURES ACT

5 U.S.C. § 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be deter-

mined on the record after opportunity for an agency hearing, except to the extent that there is involved —

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a [an] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title. . . .

5 U.S.C. § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence —

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title. . . .

5 U.S.C. § 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title. . . .

JUDICIAL REVIEW

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those partes of it cited by a party, and due account shall be taken of the rule of prejudicial error.

MICHIGAN MOTOR CARRIER ACT

Public Act 254, 1933, M.C.L. 475.1 *et seq.*; M.S.A. 22.531 *et seq.*

An Act to promote safety upon and conserve the use of public highways of the state; to provide for the supervision, regulation, and control of the use of such highways by all motor vehicles operated by carriers of property for hire upon or over such highways; to preserve, foster, and regulate transportation and permit the coordination of motor vehicle transportation facilities; to provide for the supervision, regulation, and control of the use of such highways by all motor vehicles for hire for such purposes; to classify and regulate carriers of property by motor vehicles for hire upon such public highways for such purposes; to give the Michigan Public Service Commission jurisdiction and authority to prevent evasion of this act through any device or arrangement; to insure adequate transportation service; to give the commission jurisdiction and authority to fix, alter, regulate, and determine rates, fares, charges, classifications, and practices of common motor carriers for such purposes; to require filing with the commission of rates, fares, and charges of contract carriers and to authorize the commission to prescribe minimum rates, fares, and charges, and to require the observance thereof; to prevent unjust discrimination; to prescribe the powers and duties of said commission with reference thereto; to provide for appeals from the orders of such commission; to confer jurisdiction upon the circuit court for the county of Ingham for such appeals; to provide for the levy and collection of certain privilege fees and taxes for such carriers for such purposes and the disposition of such fees and taxes; and to provide for the enforcement of this act; and to prescribe penalties for its violations.

M.C.L. 475.1a; M.S.A. 22.531(1) Short title of act. Section 1a. This act shall be known and may be cited as "The motor carrier act."

M.C.L. 475.2; M.S.A. 22.532. Motor vehicles operated for hire; general purposes of regulatory act. Section 2. It is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the commission the power and authority to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) Relieve all future undue burdens and congestion on the highways arising by reason of the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways; (c) promote competitive and efficient transportation services; (d) meet the needs of motor carriers, shippers, receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; (h) promote intermodal transportation; (i) prevent unjust discrimination; (j) promote greater participation by minorities in the motor carrier system; (k) provide and maintain service to small communities and small shippers; and (l) prevent evasion of this act through any device or arrangement.